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Filing date: **03/13/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058621
Party	Plaintiff Thru, Inc.
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Signature	/s/ John M. Cone
Date	03/13/2014
Attachments	140312 Motion to Strike Seventh Affirmative Defense.pdf(11578 bytes ) Motion Exhibit A - Answer.pdf(78651 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In the Matter of Registration No. 4,478,345 DROPBOX**

<hr/>	§	
THRU INC.,	§	
Petitioner,	§	
	§	
v.	§	Cancellation No. 92058621
	§	
DROPBOX, INC.,	§	
Registrant.	§	
<hr/>	§	

TO THE HONORABLE TRADEMARK TRIAL AND APPEAL BOARD

**MOTION UNDER FED. R. CIV. P. 12(e) or (f)**

Petitioner THRU INC. (“Thru”) files this Motion to Strike Registrant’s Seventh Affirmative Defense, or in the Alternative, for a More Definite Statement and in support would show the Board as follows:

1. On March 6, 2014, Registrant filed its Answer to this Petition. A copy of the Answer is attached as Exhibit A.
2. The Answer contains seven Affirmative Defenses. This Motion relates to the Seventh Affirmative Defense.
3. The Seventh Affirmative Defense, Section 12 of the Answer, alleges “Petitioner's representations to the U.S. Patent and Trademark Office in support of its application to register the DROPBOX mark are misleading, were made in bad faith and constitute unclean hands.”
4. An allegation of fraud triggers a heightened pleading standard, which requires “In alleging fraud or mistake, a party must state with particularity the

circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). A sufficient pleading must identify the particular statement(s) alleged to constitute fraud and the person making those statements. The Federal Circuit has referred to the rule as requiring identification in the pleading of the specific “who, what, when, where and how of the material misrepresentation or omission, committed before the PTO. *Exergen Corp. v. Wal-Mart Stores*, 575 F.3d 1312 (Fed. Cir. 2009), *quoting DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir. 1990). See *also In re BP Lubricants USA, Inc.*, 637 F.3d 1307 (Fed. Cir. 2011) (heightened pleading standard applied in false marking claims). While *Exergen* applied the rule to claims of fraud in a patent application, the logic applies equally to trademark cases. This Registrant has failed to meet the standard of particularity required by the rule..

#### **PRAYER**

Petitioner prays that Registrant’s Seventh Affirmative Defense be struck, or, in the alternative, that Registrant be required to replead the seventh affirmative defense with sufficient particularity to meet the requirements of Rule 9.

Dated: March 13, 2014

Respectfully submitted,

/s/ John M. Cone  
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ATTORNEY FOR PETITIONER  
THRU INC.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of March, 2014, the foregoing document was served via U.S. First Class Mail, postage prepaid on registrant, Dropbox, Inc. by mailing a true and correct copy of to:

John L. Slafsky, Esq.  
WILSON SONSINI GOODRICH & ROSATI  
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Palo Alto CA 94304-1050  
Attorney for Dropbox, Inc.

/s/ John M. Cone  
John M. Cone

ESTTA Tracking number: **ESTTA591069**

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058621
Party	Defendant Dropbox, Inc.
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Submission	Answer
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Date	03/06/2014
Attachments	Answer to Petition for Cancellation.pdf(73242 bytes )









